United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1253

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P/S

76-1258

To be argued by
MILTON S. GOULD

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

FRED STEINBERG and DENNIS RIESE,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT DENNIS RIESE

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DENNIS RIESE

Preliminary Statement

The two principal grounds on which appellant Riese has urged that his conviction for bribery should be reversed are as follows:

1. The government agents, having induced a bribe, not by mere ordinary undercover methods,

but by threatening the defendant with destruction of his business and by representations that the act was legal, have engaged in grossly improper conduct which requires dismissal of the indictment under the doctrine of Hampton v. United States, _____ U.S. _____ 48 L.Ed.2d 113 (1976).

2. In any event, the undisputed evidence shows that before appellant Riese succumbed to the inducement, he was repeatedly importuned and he repeatedly refused to pay a bribe; entrapment was thus shown beyond a doubt, and the indictment should be dismissed pursuant to Sherman v. United States, 356 U.S. 369 (1958); any other treatment of this case would, in effect, sanction governmental invasion of the right of privacy.

The government's answering brief ignores certain of our arguments, conveniently misunderstands others, contains patent misreadings of the applicable case law, and argues from evidence which was simply non-existent.

POINT I

THE OUTRAGEOUS CONDUCT OF THE GOVERNMENT AGENTS REQUIRES DISMISSAL

We argued this matter at length in Point I of our main brief. As we emphasized in our main brief (p. 31), this is not an argument based on entrapment. We did argue that entrapment was proved, but that was not until Point II of our main brief.

The government's answering brief tries to pretend that the two points are really one, and the government's purported arguments in answer to these two points are lumped together.

A careful reading of Point I of the government's brief, which apparently responds to our Point I and our Point II, shows that the government has in fact failed to answer our Point I at all. We argued in our Point I that the misconduct of the government agents requires dismissal as a matter of due process of law. The government has, in fact, pretended this argument was never made.

In arguing that due process of law should have been held to bar the conviction herein, we pointed to repeated statements by the agents that they would destroy the "chain [of restaurants] itself," and that if they were not paid, the

restaurants would "get botched up and kicked around all the time" (321a).

So far as we can tell, these exchanges, on which appellants have relied most heavily, are not even mentioned in the government's brief.

There are other passages in the tapes which contain threats which are just as explicit, and which the government does not mention. Seconds after remarking that the restaurants would "get botched up and kicked around all the time," Volpe reminded appellants (322a),

> " . . . we knocked you out of operation quite a few times."

Later, Moskowitz again reminded appellants of the agents' power to do injury. He said (326a),

> "You know, you know, what damage we do when we come in, right?

Moskowitz said the same thing again a few seconds later ("you know the damage we do . . . " 327a). Volpe thereupon reminded appellants that the agents had been able to completely close down restaurants on occasion. He said (327a),

> "You told me yourself that when we hit the two places on 57th and 3rd Avenue, on 59th and Lex, or 58th and Third, 59th and Lex, the third place closed down, that's what you said to me, right?"

Volpe pointed out that on that occasion the store involved "lost the help," and Moskowitz remarked that that particular raid cost

half your staff" (327a). Volpe then said, "This can all be prevented"(327a).

We have also pointed to repeated statements by the agents to appellants that they were "not being crooked" and that paying them money "is not being crooked" (320a, 321a). We have discussed that the agents actually intended to convince Riese that "everything [he was] doing was legal" (36a).

We can find no reference to these passages in the government's brief.

The government has argued that the agents' conduct was not outrageous, since it constituted a "measured response" (Br. p. 15), a "careful response" (Br. p. 16), to what the government thinks was a provocative remark by Steinberg out of the presence of Riese.

We have never denied this; in fact, we have insisted on it. We have shown by undisputed evidence out of the mouths of the government's own witnesses that a time came when the government admitted to itself that it did not have sufficient evidence to convict Riese of anything. We have shown that the government agents were told by their superiors that they needed more evidence on Riese" (87a). We have urged that the government, recognizing that Riese had thus far resisted the repeated inducements,

quite coldly, deliberately, and in a "measured" and "careful" manner, set out to trap him with threats and lies.

The government's brief, so far as we can tell makes no reference to the evidence of the conversations between the agents and their superiors, in which it was admitted that they "needed more evidence on Riese."

The government persists in pretending that our due process point is really an entrapment point.

The government argues (Br. p. 17),

> "There can be entrapment as a matter of law only if the government induced or created the offense, and if there is no evidence that the defendant was predisposed to commit the crime."

This proposition is substantially correct but irrelevant. When we refer to the agents' efforts to cause the commission of a crime by vicious coercion and misrepresentations to the effect that the act solicited is not a crime, we are not talking about any kind of entrapment, including "entrapment as a matter of law." We are arguing on the basis of the Due Process Clause. We are urging that the evidence in this case requires the application of the due process defense referred to in United States v. Hampton, _____ U.S. _____, 48 L.Ed.2d 113 (1976).

Astonishingly, the government ignores that part of the Hampton decision we have relied on, and instead explains Hampton in

the following way (Br. p. 19):

> "A majority of the Court concluded that entrapment was the only available defense and that the petitioner could not prevail on entrapment because he was predisposed to commit the offense. The justice who wrote both the plurality and concurring opinions in Hampton said that the defendants predisposition was dispositive. Hampton, therefore, rejects the argument raised by appellants here."

As we pointed out as clearly as we possibly could in our main brief (pp. 47-49), a five-Justice majority of the Court, consisting of Justices Powell and Blackmun (concurring in the result) and Justices Brennan, Stewart and Marshall (dissenting) all agreed that both "due process principles" (48 L.Ed.2d at 121) and the "supervisory power" (p. 122) would bar conviction even "where the government is able to prove predisposition" (p. 122), if the government has engaged in sufficiently offensive conduct.

It is true that the conviction in Hampton was upheld. But there the government had merely supplied the illegal drug to the defendant, who had thereupon sold the drug to other undercover agents.

In Hampton, the government did not threaten to destroy the defendant's family's business if he refused to commit the crime. In Hampton, the government agents did not reveal themselves to be government agents and then assert that the act being

solicited was not "crooked." They did not tell the defendant that everything would be "legal."

Contrary to the government's suggestion, Hampton does not "reject the argument" raised by appellant. Rather, it confirms the validity of that argument.

POINT II

ENTRAPMENT WAS PROVED ON THE UNDISPUTED EVIDENCE; THE GOVERNMENT'S ATTEMPT TO ARGUE THAT RIESE WAS PREDISPOSED CANNOT STAND, IN THE FACE OF THE UNDISPUTED EVIDENCE THAT RIESE REPEATEDLY REFUSED TO ACCEDE TO THE GOVERNMENT'S REPEATED DEMANDS FOR A BRIBE.

The government refers to various evidence applicable to Steinberg only, consisting of conversations before Riese even became an actor in the tape-recorded scenarios. We urge the Court to read the government's brief carefully, in an effort to isolate the evidence claimed by the government to be applicable to Riese. It is not an easy job.

So far as we can tell, the government's main reference to evidence alleged to show predisposition on the part of Riese appears at page 7 of its brief. There the government says,

> "Reluctant to commit their own money, but stating that he had 'an awful lot at stake' and that he would love to figure out a way for the officers to receive it, Riese suggested that the aliens receiving green cards could fund the bribes (GX 1, GX pp. 49, 51, 56, 58-60, RA 312a, 314a, 319a, 321a-323a)."

We implore the Court to read the tape-transcript pages cited by the government. We hesitate to charge government counsel with misrepresenting the record, but the fact is that we simply cannot find in the pages cited or anywhere else evidence that

"Riese suggested that the aliens receiving the green cards could fund the bribes."

What one does find in these pages is a passage where Riese states that giving a bribe is "the worst thing" (319a). One sees Riese stating that he is "very, very, very reluctant to do it" (320a). One sees Riese saying, "But I would not pay the money . . . I can't say anybody is worth it to me" (321a).

The government argues that these statements by Riese simply show a "reluctance to commit corporate money to this illicit venture" (Br. p. 16). The government states that we, as Riese's attorneys, "cynically" attempt to "convert what was obviously a negotiating tactic to the height of alleged government 'overreaching'" (Br. p. 16). Presumably, the government is saying that Riese's repeatedly expressed hesitation does not demonstrate a reluctance to participate in some way in a bribery, but shows only a reluctance to use company money. Presumably, the government relies on a statement by Riese in which he speculated that a person paying $1,000 to a lawyer would be happy if he could get his papers less expensively (321a).

Despite the government's contention that this was an "obvious" negotiating tactic, despite the government's claim that this can be read as a suggestion by Riese that the aliens could fund the bribes, it is demonstrable that this statement was nothing of the sort.

With respect, we think it is the government, and not ourselves, who is engaging in "cynical" treatment of this record. Three lines after the statement referred to, Riese said he would not pay the money and nobody was "worth it" to him (321a). Thirty-one lines after the statement referred to, Riese made it crystal clear that not only would he refuse to pay a bribe; he also would refuse even to be involved. He said (322a),

> " . . . I am saying it is not worth it for me to pay it or even get involved in that . . . " (Emphasis added).

A few moments later, it was Volpe, and not Riese, who bluntly suggested that Riese would not have to give the agents the money, and could instead cause "somebody else to give it to us . . . somebody you can trust . . . " (322a).

Thirty-five lines after this statement, Riese again insisted that he would not only refuse to pay, but would refuse to be a "party" to any such thing. He said (323a),

> "I would like not to be a part of that, I mean, I just have too much at stake to be a party to that."

The evidence the government tries to pretend involves Riese simply is not there. Ad hominem attacks on appellant's counsel will not fill the gap.*

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*It is noteworthy that not even the government believed that Riese had agreed to arrange bribes at this time. It was after the conversation referred to above that the agents' superiors told them they "needed more evidence on Riese."

We have shown in our main brief that the Supreme Court, in Sherman v. United States, 356 U.S. 369 (1958), on facts we believe to be indistinguishable, held that entrapment was proved, despite a contrary jury finding. We have shown that in Sherman, repeated hesitation in the face of repeated requests was held to disprove the allegation that the defendant had been "predisposed." The government argues that Sherman does not apply. But the government, no matter how it tries to twist the record, cannot evade the tape-recorded statements by Riese in this case. The government made those recordings and it must live with them. The transcripts show that Riese, on no less than six occasions during the course of the provocation, stated that he would not pay the requested bribes and would not even be "involved" or be "a party" to the payment of any bribes. For this reason, Sherman requires dismissal.

We have also urged that if government agents are permitted to act in this fashion, if they are permitted to keep demanding and threatening in the face of repeated refusals until the defendant succumbs, then the right of privacy is in serious danger. We have urged that the government has no right to engage in meddlesome investigations designed to determine only the amount of a man's "price," to determine only his breaking point.

The government misunderstands our argument, or pretends to misunderstand it. The government simply cites Lopez v. United States, 373 U.S. 427 (1963), for the proposition that a defendant's right of privacy is not invaded simply because his conversation with an undercover agent is tape-recorded by that agent.

We thought we had made it clear that our argument based on the right of privacy has nothing to do with the tape recordings. The intrusion which we think constitutes the threat to the right of privacy is the intrusion inherent in repeated provocation of a person not then engaged in crime and about whom the government has no adverse information.

The government has failed completely to address this point.

POINT III

BECAUSE OF THE PROSECUTOR'S BALD APPEAL TO XENOPHOBIA, APPELLANTS WERE DEPRIVED OF A FAIR TRIAL.

In Point III of our main brief, we argued that the prosecutor's closing statement, combined with references during the trial to irrelevant evidence, created prejudice. We argued that the government obtained its conviction herein on the basis of an appeal to the jury's prejudice against, and fear of, foreigners and aliens.

We do not think the government's answering brief deals with this point, and we have nothing to add to it at this time.

We note, however, that in its argument that the prosecutor's summation was proper, the government again resorts to a personal attack on defense counsel. During his closing argument, counsel for appellant Riese pointed out to the jury that defendants had never done anything wrong in the past, and that there was no proof that defendants had ever before been involved with the law. In its brief (p. 25n), the government refers to these passages as "the misleading statements Riese's own counsel made to the jury in his summation . . . " The government says that since neither defendant testified, there was "no basis in the record for these statements" (Br. p. 25n).

This intemperate accusation is both irresponsible and false. This was a case wherein the defense of entrapment had been raised. Inducement having been shown, it was the government's burden to prove predisposition if it could. Evidence of prior convictions or wrongdoing would have been one way to prove predisposition. The government offered no such evidence whatever. Counsel was certainly entitled to point out that fact to the jury, and we are at a loss to understand how the government can contend otherwise.

The government goes on to say that the statements of counsel were not true, because Riese had once been arrested on a marijuana charge, which the government says "resulted in youthful offender treatment" (Br. p. 25n). Because of this, the government says that "counsel's statement was false."

This is another irresponsible accusation. Counsel said there was no proof of defendants' involvement with the law, and that was perfectly true. In any event, the facts are that the arrest occurred because an acquaintance mailed Riese a package containing a small amount of marijuana, as a joke, and without Riese's prior knowledge. At the sentencing, counsel for Riese explained these facts and stated that the matter had been dropped (Sentencing, May 21, 1976, Tr. 8). The prosecutor stated that he had no reason to question this representation (Tr. 9). We have caused a diligent investigation

of this matter to be made, which included a check of the court files. So far as we can determine, the fact is that there was no conviction at all in connection with this mistaken arrest, the matter was dismissed, and there was no "youthful offender treatment."

CONCLUSION

For the reasons stated above and in our main brief, the conviction of appellant Riese should be reversed, and the case should be remanded with instructions to dismiss the indictment. In the alternative, a new trial should be ordered.

Respectfully submitted,

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two (2)

Service of ~~three (3)~~ copies of the

within reply brief

is hereby received this 22 day of Oct. 1976

by Joyce K. Brew

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